

1 STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
2 ALAMANCE COUNTY SUPERIOR COURT DIVISION
3 File No. 16 CVS 990

4 CRAZIE OVERSTOCK PROMOTIONS, LLC

5 Plaintiff,
6 vs.

7 STATE OF NORTH CAROLINA, MARK J.
8 SENTER, in his official capacity
9 as Branch Head of the Alcohol
Law Enforcement Division, and in
his individual capacity; et al,

10 Defendants.
11 -----

12 CONTINUED HEARING ON PRELIMINARY INJUNCITON

13 BEFORE THE HONORABLE JUDGE VINSTON M. ROZEIR, JR.

14 Thursday, November 2, 2017

15 Wake County Courthouse

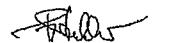
16 311 Fayetteville Street

17 Raleigh, North Carolina

18 Time Commencing 9:30 a.m.

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(919) 590-0370	11 WITNESS TED LYDA
9 Xanthony@morningstarlawgroup.com	12 Examination by Mr. Anthony 123, 153
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11 BY: J. JOY STRICKLAND, ESQUIRE	15 PLAINTIFF'S EXHIBITS FOR ID IN EVIDENCE
12 114 West Edenton Street	16 25 -- 40
13 Raleigh, North Carolina 27603	17 26 -- 42
Phone: 919.716.6516	18 52 101 122
12 JStrickland@NCDoj.gov	19 53 136 139
13	20 54 -- 161
14	21
15	22 * * *
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1 PROCEEDINGS	Page 5
2 (Whereupon, the Court had a discussion with the	1 use of those in lieu of having live
3 litigant and the official on staff court reporter	2 testimony.
4 was dismissed.)	3 She has reviewed those and has indicated
5 THE COURT: Yes, sir, so what were you	4 to us that she will not consent to the use of
6 saying in regard to the affidavits of	5 those affidavits.
7 witnesses that you wanted to address?	6 We have three of them, three affidavits,
8 MR. ANTHONY: Thank you, your Honor, and	7 and they are consistent with what I think we
9 also as a preview. We have today Jeff Smith	8 had previewed to the Court and to Ms.
10 who is finishing up his testimony on the	9 Strickland.
11 redirect and any further re-cross examination	10 Two of those witnesses, the affidavits
12 and we are calling Dr. Gordon as an expert	11 are from Ted Lyda, Keith Bush, and Dawn
13 witness to testify as well.	12 Moffatt. Two of those witnesses, Ted Lyda
14 In addition to that you might recall	13 and Keith Bush are available here this
15 that we talked about the possibility of	14 morning to testify and they will be getting
16 presenting some affidavits from some owners	15 here by 11:00 a.m.
17 of retail establishments to explain that the	16 We can have them testify. Dawn Moffatt
18 reason that they had closed their stores is	17 is not available today or tomorrow to be able
19 as a result of some of the law enforcement	18 to testify.
20 actions by ALE.	19 I think for purposes of the hearing, we
21 We had previewed what those affidavits	20 will likely be able to just expedite it and
22 might look like with the Court and with Ms.	21 go on the affidavits. I don't know that live
23 Strickland. We prepared those affidavits and	22 testimony is necessarily required.
24 presented those to Ms. Strickland for her to	23 This is a preliminary injunction hearing
25 review and see if she would consent to the	24 as opposed to a full-blown trial.
	25 For purposes of Mr. Lyda and Mr. Bush

<p>1 based solely on chance.</p> <p>2 When you take the whole system into 3 play, I would argue that the amount of chance 4 that is present predominates that as skill 5 and doesn't put them into any exception in 6 this statute, your Honor, or the others that 7 are there.</p> <p>8 Your Honor, a case came out just in 9 August of this year where Crazie Overstock 10 had sued the Bladen County Sheriff's Office 11 and realizes an unpublished opinion. I am 12 not asking your Honor to consider it for 13 precedential value.</p> <p>14 Specifically in that case the Court of 15 Appeals said that they were not determining 16 the merit of the Rewards system. They were 17 addressing specifically whether or not there 18 was an immunity issue for the defendants in 19 that case.</p> <p>20 But in their opinion, it says, "It 21 certainly can be argued that the CO rewards 22 program is a form of illegal gambling," and 23 it goes on to explain exactly what the Crazie 24 Overstock program does.</p> <p>25 I am not asking your Honor to consider</p>	<p style="text-align: right;">Page 222</p> <p>1 that for the purpose of setting a 2 precedential appellate case that has rules 3 already on the legality of this program, but 4 if the Court of Appeals has included language 5 saying, "It can be argued," then I am 6 asking your Honor to look at the evidence 7 that you have heard which is, as I say, I am 8 making the argument that it is illegal 9 gambling, for you to find that the plaintiffs 10 cannot show they can be successful on the 11 merits because the way that their system 12 operates does violate the law, your Honor.</p> <p>13 Thank you.</p> <p>14 THE COURT: Yes, sir.</p> <p>15 MR. ANTHONY: Thank you, your Honor.</p> <p>16 Let me address that case first to be very 17 clear about that. It is a recent case to the 18 Court of Appeals and it involved Crazie 19 Overstock and the Court made a statement that 20 it could be argued in-dicta at the end, but 21 the issue in that case was whether or not 22 there was quasi-judicial immunity or 23 qualified immunity.</p> <p>24 The merits of that case, the merits of 25 the Rewards Program, the details of how the</p>
<p>1 Rewards Program operates was not presented to 2 the Court of Appeals.</p> <p>3 That was not an issue at all that was 4 discussed with the Court of Appeals.</p> <p>5 There was clearly no determination, no 6 nothing, related to that. They threw that 7 statement in there. There actually has been 8 a rehearing that has been granted in that 9 case. The defendant requested so it is 10 actually going to continue back before the 11 Court of Appeals as it is.</p> <p>12 This argument with respect to it is a 13 sweepstakes because there a prize that is 14 really an argument that is based on 15 semantics, as best as I can understand it.</p> <p>16 It is based on Exhibit 13 having the 17 word prizes listed at the top.</p> <p>18 There was direct testimony about that 19 term by Mr. Smith and by Mr. Farley. The 20 word "prizes" was not a legal term as is 21 being used now by Ms. Strickland in her 22 argument. It was just, "Those are the 23 Reward points that you get."</p> <p>24 It says prizes, however as we were clear 25 that legally what a prize is, it is something</p>	<p style="text-align: right;">Page 224</p> <p>1 that has value and here all the evidence 2 shows is that these Reward points have no 3 value. As I discussed earlier there is 4 nothing you can do with that.</p> <p>5 You cannot redeem them for cash. You 6 cannot go get products off the website or 7 discounts off those products. You cannot 8 apply it towards shipping or discount on the 9 shipping. You cannot use it for anything 10 other than going back and playing Rewards 11 Games again or using it to enter the 12 dexterity test.</p> <p>13 As I mentioned before, as we cited in 14 our brief, there are cases that say that just 15 being able to play something again, to play 16 something like that, is not something that is 17 of value.</p> <p>18 The Rewards points have no value and 19 that is not a basis to say under the law that 20 it is a sweepstakes. When you look at the 21 way that that statute operates and the way 22 that our system does, it doesn't.</p> <p>23 It is always important to keep in mind 24 too, as you think about, just because there 25 is some sort of chance associated with it, it</p>

<p>1 doesn't make it a sweepstakes. 2 A sweepstakes by definition means a game 3 of chance according to 14-306.4 subsection A 4 5, "sweepstakes means any game advertising 5 scheme or plan or other promotion which with 6 or without payment of any consideration a 7 person may enter to win or become eligible to 8 receive a prize a determination of which is 9 based upon chance." 10 Under the sweepstakes statute, 11 sweepstakes is a game of chance, but there is 12 a carve out if it is dependent upon skill or 13 dexterity. 14 By definition, a sweepstakes is a game 15 of chance, however, if it has skill and 16 dexterity to it, then it is not an illegal 17 sweepstakes under 14-306.4. 18 The Court of Appeals in the Gift Surplus 19 Sand Hills case has clarified that. When you 20 look at this what you are figuring out is 21 whether the ultimate outcome, the actual 22 prize which in here is the cash back Reward, 23 whether that is determined by chance, whether 24 chance can override or thwart the exercise 25 of skill.</p>	<p style="text-align: right;">Page 226</p> <p>1 And here as we have shown the only prize 2 that you get is not thwarted by chance. It 3 is not overridden by chance in any scenario. 4 It is always determined by the skill and the 5 dexterity so it is not an illegal sweepstakes 6 under 14-306.4. 7 THE COURT: We are going to recess at 8 this time. Come back tomorrow morning at 9 10:30 and I say that because I may need some 10 extra time to make sure that I am clear in 11 regards to my ruling on the State's motion to 12 not proceed. 13 But everyone needs to be prepared in the 14 event that I deny the motion. We are in 15 recess until 10:30. 16 17 18 19 20 21 22 23 24 25</p>
<p>1 2 United States of America) 3 ss: 4 ORANGE COUNTY) 5 6 CERTIFICATE OF THE REPORTER 7 8 I, T. S. Hubbard, Jr., do hereby certify 9 that the witness whose deposition is hereinbefore set 10 forth was duly sworn by myself, a duly authorized notary 11 in and for the State of North Carolina, and that the 12 within transcript is a true and accurate reflection 13 of the testimony herein. 14 I further certify that I am not related by 15 blood or marriage to any of the parties who are at 16 issue in this cause of action. 17 IN WITNESS WHEREOF, I have hereunto set my 18 hand this 6TH day of November 2017. 19 20  21 Thomas S. Hubbard, Jr. 22 Court Reporter 23 24 25</p>	<p style="text-align: right;">Page 228</p> <p>1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>